IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Criminal Appeal No. S-61 of 2024
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Appellant	Qadeer Hussain son of Nazeer Ahmed Domki, Through Mr. Safdar Ali Ghouri, Advocate.
Respondent	The State Through Mr. Sardar Ali Solangi, DPG.
Date of hearing/ short order	28-08-2025
Date of detailed reasons	_____

J U D G M E N T
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SHAMSUDDIN ABBASI, J. Through instant appeal, Qadeer Hussain Domki, appellant has challenged the validity of the judgment dated 26.07.2024, handed down by the learned Sessions Judge, Kashmore at Kandhkot, in Sessions Case No.143 of 2024 (Re: State v. Qadeer Hussain), emanating from FIR No.94 of 2024, registered at P.S. A-Section Kandhkot, for the offence under Section 23(i)(a) of the Sindh Arms Act, 2013, through which he was convicted and sentenced to undergo rigorous imprisonment for a period of five years and to pay a fine of Rs.50,000/- and to suffer simple imprisonment for a further period of six months in lieu of fine, however, the benefit in terms of Section 382-B, Cr.P.C. was extended to the appellant.

2. The prosecution case, in brief, is that on 05.04.2024, complainant HC Abdul Jabbar Channa lodged the FIR at P.S. A-Section Kandhkot, stating therein that on that day he along with PC Muhammad Asad, PC Hussain Bux and DPC Riaz Ahmed, while on patrol, reached Degree College Road, Kandhkot at about 9:00 pm, apprehended a person possessing one Mini G-III pistol of 30 bore with two empty magazines, who disclosed his name as Qadeer Hussain Domki. During his personal search, cash amounting to Rs.2,000/- was also recovered. As the accused failed to produce a valid license for

possessing the weapon, the same was sealed under a mashirnama prepared at spot in presence of mashirs, who alongwith the recovered property was brought at Police Station A-Section Kandhkot, where a case vide FIR No.94 of 2024 under Section 23(i)(a) of Sindh Arms Act, 2013 registered on behalf of the State.

3. Pursuant to the registration of FIR, the investigation was followed and in due course the challan was submitted before the Court of competent jurisdiction under the above referred Section, whereby the appellant was sent up to face the trial.

4. The appellant was indicted for recovery of an unlicensed pistol of 30 bore falling under Section 23(i)(a) of Sindh Arms Act, 2013. He pleaded not guilty to the charged offence and claimed a trial.

5. At trial, the prosecution has examined as many as five witnesses. The gist of evidence, adduced by the prosecution in support of its case, is as under:-

6. Complainant HC Abdul Jabbar appeared as witness No.1 Ex.3, PC Muhammad Asad 9 (mashir of arrest, recovery and site inspection) appeared as witness No.2 Ex.4, ASI Kaleemullah (Investigating officer) appeared as witness No.3 Ex.5, PC Barkat Ali, who took the case property and deposited the same in the office of Incharge Forensic Science Laboratory, Forensic Division Larkana, appeared as witness No.4 Ex.6 and PC Saddam Hussain, who has deposited the sealed parcel of case property in the Malkhana of police station, appeared as witness No.5 Ex.7. All of them have exhibited certain documents in their respective evidence and were subjected to cross-examination by the defence. Thereafter, the prosecution closed its side vide statement Ex.8.

7. Appellant was examined under Section 342, Cr.P.C. at Ex.9. He has denied the allegations imputed upon him by the prosecution, professed his innocence and stated his false implication by the police due to exchange of hot words. He opted not to make a statement on Oath under Section 340(2), Cr.P.C. nor produce any witness in his defence.

8. Upon culmination of the trial, the learned trial Court found the appellant guilty of the offence charged with and, thus, convicted and sentenced him as detailed in para 1 (supra), which necessitated the filing of listed appeal.

9. The learned counsel appearing for the appellant contends that the appellant is innocent and has been falsely implicated in this case. Next contends that the impugned judgment suffers from legal as well as factual infirmities. Also contends that the prosecution evidence is contradictory and unreliable and in absence of any independent corroboration their evidence is unsafe to rely upon. Per learned counsel, nothing incriminating has been recovered from the possession of the appellant and the alleged case property has been foisted upon him as well as the forensic report is manipulated one. Lastly submits that the impugned judgment is bad in law and facts, based on misreading and non-reading of evidence, without application of a conscious judicial mind and against the principle of natural justice, hence liable to be set-aside and the appellant deserves to be acquitted of the charge.

10. Conversely, the learned Deputy Prosecutor General has supported the impugned judgment and submitted that the prosecution has successfully proved the charge against the appellant beyond reasonable doubt. He emphasized that positive report of the forensic division corroborates the version of complainant. He argued that official witnesses are as competent as private witnesses and their testimony cannot be discarded merely on the ground of official status and minor discrepancies, according to him, did not materially affect the prosecution case and prayed for dismissal of appeal.

11. I have given my anxious consideration to the submissions of both the sides and perused the entire record carefully with their able assistance.

12. Complainant HC Abdul Jabbar while appearing before the learned trial Court has deposed that on 05.04.2024 he was posted as HC at P.S A-Section Kandhkot. On that day, he left P.S vide entry No.45 at 2000 hours, accompanied by PC Mohammad Asad, PC

Hussain Bux and DPC Riaz Ahmed, for patrolling in official mobile. After patrolling various places, they reached link road Degree College Kandhkot near Suhriyani Graveyard and saw on lights of mobile van a person in suspicious condition possessing a black colour shopper, who on seeing police tried to escape. They alighted from mobile van and apprehended that person. The shopper was taken into possession, which was found containing Mini G3 type 30 bore pistol and a butt and two empty magazines. The person was asked about his name and license of pistol, who disclosed his name as Qadeer Hussain son of Nazir Ahmed Domki, resident of village Nazir Ahmed Domki, Taluka Kashmore, but failed to produce a license of weapon. He prepared mashirnama of arrest and recovery in presence of P.C Mohammad Asad and PC Hussain Bux and obtained their signatures at spot. His personal search was conducted and two currency notes of Rs.1000/- denomination each were also recovered. The recovered property was sealed at spot and thereafter the accused alongwith the recovered property was brought vide entry No.49 at 2200 hours and completed writing FIR vide daily diary entry No.50 at 2220 hours. He has produced daily diary entry No.45 at Ex.03/A. He also produced daily diary entry Nos.49 and 50 at Ex.03/B. He has produced mashirnama of arrest and recovery at Ex.03/C as well as FIR at Ex.03/D. He handed over FIR, recovered case property, custody of accused and relevant case papers to Investigation Officer ASI Kaleemullah Chandio for further investigation. He further deposed that on 06.04.2024 he pointed out the place of incident to Investigation Officer, who prepared such mashirnama in presence of same mashirs. He has identified the accused as well as case property in Court as same.

13. A bare perusal of the evidence, adduced by the complainant, seems to be doubtful. Per record of the case, the alleged incident has taken place at Degree College Road, Kandhkot, a busy locality, yet the complainant did not bother to associate an independent source to strengthen the prosecution case by collecting any independent evidence from the place of incident. I am conscious of the fact that people normally refrain from becoming a witness in criminal cases but still no signs appear in the case to show that the complainant (recovery officer) tried his level best to associate an independent

witness but could not succeed. It seems that police has handled the case quite in a mechanical manner and failed to obey the requirement of Section 103, Cr.P.C. It is, thus, held that the prosecution case rests on very weak evidence which cannot be considered randomly for maintaining conviction and sentence awarded to the appellant.

14. Although applicability of Section 103, Cr.P.C. is ousted as is embodied under Section 34 of the Sindh Arms Act, 2013, and the same is not attracted in the cases relating to recovery and personal search of an accused, but where the alleged recovery was made from a busy place, omission to join independent mashirs cannot be brushed aside lightly. Prime object of Section 103, Cr.P.C. is to ensure transparency and fairness on the part of police during course of recovery, curb false implication and minimize the scope of foisting of fake recovery upon an accused. No iota of evidence is available on record as to why complainant has not tried to join an independent person to witness the arrest and recovery proceedings despite of the fact that the place of recovery was a busy road. All this shows that proceedings were carried out in a casual and cursory manner without making an effort to join an independent witness /mashir of arrest and recovery proceedings, which is a clear violation of the provisions of Section 103, Cr.P.C. I am also cognizant of the fact that on the next day viz 06.04.2024 the Investigating Officer ASI Kaleemullah (PW.3 Ex.5) visited the place of incident and conducted site inspection on the pointation of complainant, but he too failed to discharge his duties in the manner as provided under the law. He was well aware of the fact that no independent and private person was associated by the complainant to act as mashir of arrest of accused and recovery of weapon, therefore, he was under obligation to make positive efforts and arrange an independent witness while visiting the place of incident and conducting site inspection, but no such indication is available on record. As bare perusal of the record reveals that the Investigating Officer has failed to discharge his duties in the manner as provided under the law. Omission to join an independent witness by both the officers, thus, rendered the case of the prosecution extremely doubtful.

15. No doubt police witnesses are as good witnesses as that of any other person from the public and conviction could be based on their evidence, but when a police witness was going to charge a person for an offence which carries punishment in shape of detention, his testimony should be reliable, dependable, trustworthy and confidence inspiring and if such qualities are missing, no conviction could be recorded on the basis of evidence of a police witness. The entire record is silent as to whether any effort was made to persuade any person from the locality or for that matter the public was asked to become a witness. Per settled law every accused would be deemed to be innocent and may not be termed as criminal unless found guilty of charge by a competent Court of law after safe trial. Hence, on this count too, the alleged recovery of weapon is fatal to the case of the prosecution. Reliance in this behalf is well be made to the case of *Tayyab Hussain Shah v The State* (2000 SCMR 683), wherein the Hon'ble Supreme Court ruled as under:-

> *"The other piece of evidence is the recovery of gun statedly at the pointation of the appellant. No member of the public was made to join the said recovery. The plea of the accused was that the gun had been planted on him and this fake recovery was proved by the police witnesses namely, the Investigating Officer alongwith the Foot Constable. The plea is that the said recovery is of no evidentiary value as the same was made in violation of requirements of section 103, Cr.P.C. In the case of State through Advocate General, Sindh v. Bashir and others (PLD 1997 SC 408) Ajmal Mian, J., as he then was, later Chief Justice of Pakistan, observed that requirements of section 103, 'Cr.P.C. namely that the two members of the public of the locality should be Mashirs to the recovery, is mandatory unless it is shown E by the prosecution that in the circumstances of a particular case it was not possible to have two Mashirs from the public. If, however, the statement of the police officer indicated that no effort was made by him to secure two Mahsirs from public, the recoveries would be doubtful. In the instant case, from the statement of the Investigating Officer it is apparent that no efforts were made to join any member of the public to witness the said recovery. In F the overall circumstances of the case, we do not find it safe to rely on the said recovery. Once recovery of gun is considered doubtful the report of the fire-arm expert that the empty statedly recovered from the spot matched with the gun loses its significance".*

16. The prosecution has also examined PC Sadam Hussain as PW.5 Ex.7. He in his cross-examination has admitted that although entry

No.166 regarding deposit of case property was made in Register No.19, but he did not produce the original Register in his evidence. He also conceded that no entry was made regarding removal of case property for onward transmission to the office of Forensic Division. Register No.19, being the Malkhana Register, is a vital document for proving safe custody of case property and its safe transmission to the office of Ballistic Expert for examination. Its non-production caused a serious dent to the prosecution case. It is settled law that if the best available evidence is withheld, the Court may draw an adverse inference under Article 129(g) of the Qanun-e-Shahadat Order, 1984, that had such evidence been produced, it would have gone against the prosecution. This omission, thus, creates doubt on the genuineness of the recovery. Reliance in this behalf may well be made to the case of *Samandar @ Qurban and others v The State* (2017 MLD 539 Karachi). In the said case while dealing with the points of violation of Section 103, Cr.P.C. and delay in sending the weapon to Ballistic Expert, this Court has observed as under:-

> *"Apart from above sending of crime weapon to ballistic expert for forensic report with delay of 20 days of their recovery also added further doubt into the prosecution case, thus in view of above coupled; with non-compliance of section 103, Cr.P.C., it can safely be presumed that alleged recovery of crime weapon was not made from the possession of the appellants as alleged by the prosecution."*

17. There is yet another infirmity. The crime weapon alleged to be recovered on 05.04.2024, but it was sent to the office of Forensic Division on 08.04.2024 after an unexplained delay of three days without furnishing any explanation. In view of this background of the matter, two interpretations are possible, one that the alleged weapon has not been tampered and the other that these were not in safe hand and have been tampered. It is settled law that when two interpretations of evidence are possible, the one favouring the accused shall be taken into consideration. Thus, the positive FSL report qua the weapon being delayed without furnishing any plausible explanation, would not advance the prosecution case, therefore, has wrongly been relied upon by the learned trial Court. The prosecution has failed to substantiate the point of safe custody of case property and its safe transit to the expert through cogent and reliable evidence and the alleged recovery of weapon, on the face

of it, seems to be doubtful in view of the dictum laid by the Hon'ble apex Court in the cases of *Kamal Din alias Kamala v The State* (2018 SCMR 577) and *Ikramullah & others v The State* (2015 SCMR 1002).

18. The cardinal principle of justice always laid emphasis on the quality of evidence which must be of first degree and sufficient enough to dispel the apprehension of the Court with regard to the implication of innocent persons along with guilty one by the prosecution, otherwise, the golden principle of justice would come into play that even a single doubt if found reasonable would be sufficient to acquit the accused, giving him/them benefit of doubt because bundle of doubts are not required to extend the legal benefit to the accused. In this regard, reliance is placed on a view held by the Hon'ble Supreme Court in the case of *Muhammad Mansha v. The State* (2018 SCMR 772), wherein it has been ruled as under:-

> *"4. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession, but as a matter of right. It is based on the maxim, "it is better that ten guilty persons be acquitted rather than one innocent person be convicted". Reliance in this behalf can be made in the cases of Tariq Pervez v. The State (1995 SCMR 1345), Ghulam Qadir and 2 others v. The State (2008 SCMR 1221), Muhammad Akram v. The State (2009 SCMR 230) and Muhammad Zaman v. The State (2014 SCMR 749).*"

Similar view has also been taken in the cases of *Abdul Jabbar and another v The State* (2019 SCMR 129), *Riaz Masih alias Mithoo v The State* (1995 SCMR 1730) and *Sardar Ali v Hameedullah and others* (2019 P.Cr.LJ 186).

19. It is also a well settled principle of law that involvement of an accused in an offence is not sufficient to convict him as the accused continues with presumption of innocence until found guilty at the end of the trial, for which the prosecution is bound to establish its case against the accused beyond shadow of any reasonable doubt by producing confidence inspiring and trustworthy evidence. It is a cardinal principle of administration of justice that in criminal cases the burden to prove its case rests

entirely on the prosecution. The prosecution is duty bound to prove the case against accused beyond reasonable doubt and this duty does not change or vary in the case in which no defence plea is either taken or established by the accused and no benefit would occur to the prosecution on that account and its duty to prove its case beyond reasonable doubt would not diminish. The prosecution has not been able to bring on record any convincing evidence against appellant to establish his involvement in the commission of offence charged with beyond shadow of reasonable doubt. Rather, there are so many circumstances, discussed above creating doubts in the prosecution case and according to golden principle of benefit of doubt one substantial doubt would be enough for acquittal of the accused. The rule of benefit of doubt is essentially a rule of prudence, which cannot be ignored while dispensing justice in accordance with law. Conviction must be based on unimpeachable evidence and certainty of guilt and any doubt arising in the prosecution case, must be resolved in favour of the accused. The said rule is based on the maxim "it is better that ten guilty persons be acquitted rather than one innocent person be convicted" which occupied a pivotal place in the Islamic Law and is enforced strictly in view of the saying of the ***Holy Prophet (PBUH)*** that the "mistake of Qazi (Judge) in releasing a criminal is better than his mistake in punishing an innocent".

20. In view of the analysis and combined study of the entire evidence by way of reappraisal, with such care and caution, I am of the considered view, that the conviction and sentence awarded to the appellant through impugned judgment dated 26.07.2024, is without appreciating the evidence in its true perspective, rather the same is packed with various discrepancies and irregularities, which resulted into a benefit of doubt to be extended in favour of the appellant. Consequently, vide my short order dated 28.08.2025, announced in open Court, the instant Criminal Appeal was allowed and the appellant, on bail, was acquitted of the charge by extending him the benefit of doubt and discharging his surety and these are the reasons thereof.

JUDGE